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COMMERCIAL AND INVESTOR-STATE ARBITRATION: THE IMPORTANCE OF RECOGNISING THEIR DIFFERENCES

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1 Much has been written and said in recent years about perceived problems in international arbitration. The very theme of this important conference is the reassessment of, and introspection about, basal conceptions and structures of the process of arbitration. Concerns about investor-state dispute settlement (ISDS) provisions in international investment treaties have been an area of particular focus, and the debate about investment arbitration has become prominent both within the arbitration community, and in government, the academy and the press. These issues, by and large, are focused on national sovereignty and public accountability issues, and are arising at a time of increased fragmentation of, and scepticism toward, globalised trade. International commercial arbitration has also been the subject of criticism and hard evaluation. Many of the concerns in relation to international commercial arbitration are expressed in language similar to concerns about ISDS arbitration, but that superficial similarity should not be allowed to disguise the important differences between the two types of dispute resolution, and the quite different issues involved.

2 Let me begin by saying something of ISDS.

Concerns regarding investor-state dispute settlement

3 The perceived problems with investment arbitration have been summarised in numerous works by judges, scholars and bodies such as the European Union.¹ These include: a

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¹ See, eg. Stephen M Schwebel, 'Keynote Address: In Defence of Bilateral Investment Treaties' in *International Arbitration – Legitimacy: Myths, Realities and Challenges* (ICCA Congress Series No 18, 2012) at 6; Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 *Harvard International Law Journal* 428 at 469-470; Robert French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Paper presented to the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) at 3-4, 7-9; Robert French AC, 'ISDS – Litigating the Judiciary' (2015) 81 *Arbitration* 288; Sir Vivian Ramsey, 'The Challenges to International Arbitration' [2017] *Asian Dispute Review* 54; UNCITRAL, 'Possible reform of investor-State

perception of illegitimacy of ISDS in its impacts on national sovereignty, due to the lack of public accountability; the affectation of the capacity of States to legislate on issues of public policy; perceived bias or unsuitability of arbitrators of private commercial background adjudicating public disputes involving public policy; so-called “issue conflict” as arbitrators accept repeated appointments, or continue to act as counsel, and deal with the same issue more than once; issues of consistency and predictability and the lack of a developed system of precedent; the process of the appointment of arbitrators; the limited ability to review the substance of awards; and the costs of investment arbitration.

4 In an illustration of the tone of some of the coverage that ISDS has attracted in the press, *The Economist* went so far in 2014 to describe ISDS as “a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes law...”. It cited as concerns “the secretive nature of the arbitration process [and the fact that] the lack of any requirement to consider precedent allows plenty of scope for creative adjudications”.²

5 The Hon Robert French AC, when Chief Justice of the High Court of Australia, expressed what, to my mind, is the fundamental issue of concern about investment arbitration:³ the implications of ISDS arbitration for “national sovereignty, democratic governance and the rule of law within domestic legal systems.”⁴ Such concerns led the Council of Chief Justices of Australia (of which, I should say, I was and am a member) to write to the Commonwealth Attorney-General requesting that Australia:⁵

... have regard to the possibility that, absent suitable qualifications, arbitral processes might be invoked to call into question the decisions of domestic courts either by submissions that such decisions are breaches of an investment treaty or alternatively seeking findings based upon propositions inconsistent with such decisions.

6 As the former Chief Justice said:⁶

The public interest dimensions of arbitral decisions arising out of [investment treaties], particularly where they involve State regulatory action or a judicial

dispute settlement (ISDS) Submission from the European Union’ (12 December 2017) UN Doc A/CN.9/WG.III/WP.145 at 12.

² *The Economist*, ‘The arbitration game: Investor-state dispute settlement’ (11/10/2014) <<http://www.economist.com/news/finance-and-economics/2163756-governments-are-souring-treaties-protect-foreign-investors-arbitration>>.

³ See French, 2014, *op cit* 1; French, 2015, *op cit* 1.

⁴ French, 2014, *op cit* 1 at 3-4.

⁵ French, 2015, *op cit* 1 at 3.

⁶ French, 2015, *op cit* 1 at 9.

decision, means that the public policy debate will continue and continue to focus upon questions of national sovereignty, the privileging of foreign investors and the democratic legitimacy of the arbitral process.

7 Such rule of law concerns have also been noted by Lord Neuberger, the former President of the Supreme Court of the United Kingdom, as based on the fact that ISDS can have the outcome of an arbitral tribunal being able to review public policy or domestic law that has already been adjudicated upon by the court of a sovereign State.⁷

8 It should be noted at this point (as explicitly recognised in the letter from the Council of Chief Justices) that many of the concerns can be addressed at the point of treaty negotiation.

9 Well-known examples of ISDS claims have been used to justify these concerns. One example is the arbitral claim that was brought by Chevron against Ecuador, and the tribunal's interim award requiring Ecuador to suspend enforcement or recognition of a USD 9 billion judgment against Chevron.⁸ Another is the ICSID claim by Eli Lilly against Canada that contended that a decision by the Supreme Court of Canada interpreting the validity provisions of the Canadian *Patent Act* violated provisions of NAFTA.⁹ It should be noted, however, that case was decided in favour of Canada and an award in its favour was issued on March 17, 2017.¹⁰ A third was the claim brought by Philip Morris Asia under Australia's investment treaty with Hong Kong in 2011 seeking compensation of more than one billion dollars for expropriation of trade marks caused by the enactment of the Australian Government's plain packaging tobacco legislation.¹¹ Philip Morris, together with a number of other tobacco companies, lost a constitutional challenge to the legislation in the High Court of Australia in 2012.¹² The legislation was found not to be expropriatory. The arbitral claim constituted a challenge to an Australian public policy that had been declared lawful and not confiscatory by the highest court in Australia. The arbitration occurred under UNCITRAL Rules and under the auspices of the Permanent Court of Arbitration. Then Chief Justice French's concerns about ISDS

⁷ Lord Neuberger, 'Keynote Speech' (2015) 81 *Arbitration* 427 at 430-431.

⁸ See French, 2015, *op cit* 1 at 7-8; Neuberger, *op cit* 7 at 430-431.

⁹ International Centre for Settlement of Investment Disputes, 'Eli Lilly and Company v. Canada (ICSID Case No. UNCT/14/2)' <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=UNCT/14/2>>; Global Affairs Canada, 'Cases Filed Against the Government of Canada – Eli Lilly and Company v. Government of Canada' <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng>>; Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu' (University of Sydney Law School, Legal Studies Research Paper Series No 18/03, February 2018) at 18, 31; Neuberger, *op cit* 7 at 430-431; French, 2015, *op cit* 1 at 16.

¹⁰ Global Affairs Canada, *op cit* 9.

¹¹ *Tobacco Plain Packaging Act 2011* (Cth).

¹² *JT International SA v Commonwealth* [2012] HCA 43; 250 CLR 1.

were expressed in the context of that claim being on foot. That claim was ultimately rejected on jurisdictional grounds by the arbitral tribunal in December 2015.¹³ In a redacted version of the award published in 2016, the tribunal found that the claim constituted an abuse of rights, finding that Philip Morris had engaged in corporate restructuring when it was foreseeable that the government would introduce plain packaging legislation and that the “principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form[ed] the subject matter of the present arbitration”.¹⁴

10 The claim brought by Philip Morris was brought during the process of negotiation for the proposed Transpacific Partnership (TPP), which was proposed to include ISDS.¹⁵ The argument over the TPP was part of a broader zeitgeist against globalisation that in some ways has grown even more aggressive in recent years. Following the Philip Morris case, the Australian Government that was then in office withdrew its support for ISDS in trade negotiations,¹⁶ and the New Zealand government has now also adopted that position.¹⁷ In the negotiations for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the successor to the TPP (after it was abandoned by the Trump Administration) that was concluded on 8 March 2018,¹⁸ New Zealand also attempted in negotiations to exclude ISDS from the agreement though such a position was rejected by the other parties.¹⁹ It is not appropriate for me to make any comment on those policy positions, but I suggest it shows the prominence of the debate and the level, perhaps, of concern about ISDS.

11 The implications of ISDS for public policy and national sovereignty has driven arguments about the need for transparency in investment arbitration, on the basis that the public nature of these disputes means that there should be a capacity for, at least, public awareness and

¹³ See the discussion by Kawharu and Nottage, *op cit* 9 at 25-26.

¹⁴ *Philip Morris Asia Limited v Commonwealth of Australia* (Award on Jurisdiction and Admissibility, Permanent Court of Arbitration, PCA Case No 2012-12, 17 December 2015) <<https://www.pcacases.com/web/sendAttach/1711>> at [585]-[590].

¹⁵ Kawharu and Nottage, *op cit* 9 at 3. They also discuss ISDS claims that have been brought by Australian corporations against other nations, including Indonesia and Thailand: Kawharu and Nottage, *op cit* 9 at 34-38.

¹⁶ Kawharu and Nottage, *op cit* 9 at 40.

¹⁷ Kawharu and Nottage, *op cit* 9 at 40.

¹⁸ For the text of the CPTPP, see Australian Department of Foreign Affairs and Trade, ‘TPP-11 text and associated documents’ (21 February 2018) <<http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp/official-documents/Pages/official-documents.aspx>>.

¹⁹ New Zealand Ministry of Foreign Affairs and Trade, ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis’ <<https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-National-Interest-Analysis.pdf>> at 38-39. See also the detailed analysis by Kawharu and Nottage, *op cit* 9 at 6-13.

potentially public involvement.²⁰ Four principles of transparency have been proposed: publication of documents, public hearings, the capacity for other State parties to an investment treaty such as an investor's home state to participate, and the ability of non-State parties to participate as amici curiae.²¹

12 There have been several developments toward greater transparency in investment arbitrations. They include the publication by UNCITRAL in 2014 of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* that apply to investment treaties concluded after 1 April 2014 and where arbitrations are conducted under UNCITRAL rules. UNCITRAL has subsequently developed its *Rules on Transparency* into the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (the Mauritius Convention) which was opened for signature on 17 March 2015 and entered into force on 18 October 2017.²² The Mauritius Convention applies the UNCITRAL Rules on Transparency to investment treaties concluded before 1 April 2014.²³ The preamble of the Convention speaks of “recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations”. The UNCITRAL Rules provide for: publication to the public of information at the commencement of arbitral proceedings as to the parties, the economic sector involved and the treaty under which the claim is brought;²⁴ the publication of documents to the public such as the notice of arbitration, the response, statement of claim, statement of defence, written submissions, exhibit and witness lists;²⁵ submissions by third persons;²⁶ submissions

²⁰ See Taida Begic Sarkinovic, ‘Investor-State Arbitration: Between Private and Public Interests’ (2016) 12 *Manchester Journal of International Economic Law* 250 at 253-254; James D Fry and Odysseas G Repousis, ‘Towards a New World for Investor-State Arbitration through Transparency’ (2016) 48 *NYU Journal of International Law and Politics* 795 at 804-808. It should be noted that there are also transparency debates in international commercial arbitration, though with different motivations: see Catherine A Rogers, ‘Transparency in International Commercial Arbitration’ (2006) 54 *Kansas Law Review* 1301.

²¹ Fry and Repousis, *op cit* 20 at 808-811. See also a slightly different formulation in Matthew Carmody, ‘Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?’ (2016) 19 *International Trade and Business Law Review* 96 at 103-104: “the publication of information about arbitral proceedings; access to various documents from the arbitration; the involvement of third parties in the conduct of proceedings; and access to hearings.”

²² See UNCITRAL, ‘Status – United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html>.

While the treaty has entered into force, as at 6 April 2018 there are only three State parties that have ratified it: Mauritius, Canada and Switzerland. 22 State parties have signed the Mauritius Convention, including Australia, the USA, the UK, France, Germany, and Italy.

²³ Mauritius Convention, Arts 1(1), 2.

²⁴ Mauritius Convention, Art 2.

²⁵ Mauritius Convention, Art 3.

by non-disputing parties to the treaty;²⁷ public hearings for oral argument (with provision for *in camera* arrangements for parts of hearings where necessary);²⁸ a regime for exceptions to transparency in the context of confidential or protected information or to protect the integrity of the arbitration.²⁹

13 Nevertheless, despite these steps the debates about ISDS, and international arbitration, have, if anything, accelerated, most recently by the contribution of the European Court of Justice.³⁰

The ISDS landscape

14 As at 2017, there were estimated to be over 3300 investment treaties in existence.³¹ As this audience will be well aware, since the first bilateral investment treaty in 1959, these treaties have been developed in order to encourage foreign investment and to provide an enforceable mechanism for protecting these foreign investments, in the form of investment arbitration.³² The rationale for its introduction involved a critical issue in world power relationships. In his insightful opening address at the 2012 ICCA Congress in Miami, Judge Schwebel described the context in which investment arbitration developed, in the wake of the expropriation of Anglo-Iranian Oil by the Mossadegh government in 1951 in Persia and debates about permanent sovereignty over natural resources in the United Nations in the 1960s and 1970s. Judge Schwebel pointed out that investment arbitration was designed to prevent ‘gun boat diplomacy’ and characterised the “entitlement to international arbitration as one of the most progressive developments in the procedure of international law of the last fifty years”.³³

15 The development of ISDS included the conclusion of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) in 1965, under which the majority of investment arbitrations are undertaken. The conclusion of ICSID and the numerous bilateral treaties that utilise ICSID for dispute resolution superseded the indirect remedy of diplomatic protection and completed the progression from the gunboat

²⁶ Mauritius Convention, Art 4.

²⁷ Mauritius Convention, Art 5.

²⁸ Mauritius Convention, Art 6.

²⁹ Mauritius Convention, Art 7.

³⁰ *Slovak Republic v Achmea BV* (Court of Justice of the European Union, Case C-284/16, 6 March 2018).

³¹ Jeswald W Salacuse, ‘Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries’ (2017) 58 *Harvard International Law Journal* 127 at 127.

³² See Jeswald W Salacuse, ‘The Emerging Global Regime for Investment’ (2010) 51 *Harvard International Law Journal* 428; Schwebel, *op cit* 1; Salacuse, 2017, *op cit* 31 at 130-131; Gordon Smith, ‘An Introduction to Investor-State Arbitrations’ (2010) 13 *International Trade and Business Law Review* 3 at 3.

³³ Schwebel, *op cit* 1 at 5. See also, for a general discussion of the development of investment treaties and ISDS: Gus Van Harten, ‘Investment Treaty Arbitration and Public Law’ (Oxford University Press, 2007) at 12-44.

diplomacy of the late nineteenth and early twentieth century to the now well-established system of direct private rights of enforcement against sovereign states by way of investment arbitration, a remarkable flowering of the protection by the rule of law of commercial rights. In the criticisms of ISDS this history should be recalled.

16 Statistics collected by the United Nations Conference on Trade and Development reveal the growth in, and characteristics of, investor-state arbitrations.³⁴ They reveal that there have been 817 known investor-state cases. During the period of January to July 2017, there were at least 35 new cases brought, against 32 different countries. A total of 69 new cases were brought in 2016. 80% of the investment arbitrations commenced in 2017 were brought under bilateral investment treaties, while the remaining 20% were under treaties with investment provisions such as the Energy Charter Treaty and NAFTA.

17 Out of the 530 cases decided as at 31 July 2017, approximately one third were decided in favour of States and a quarter in favour of investors. The others settled or were discontinued. The most frequent domicile of claimants is the United States (152 cases) and the most frequent respondent is Argentina, reflecting the economic turmoil in that nation in the early 2000s (60 cases). Over the 30 year period from 1987 to 2017, 61% of all known cases were conducted under ICSID, with 31% conducted under UNCITRAL arbitration rules. 80% of awards over this period were unanimous, and approximately 500 different individuals have been involved as arbitrators in investment arbitrations, with UNCTAD noting a “small number” of individuals being involved in more than 30 arbitrations each.³⁵

18 These statistics give one a picture of the overall investment arbitration landscape, and of the prevalence and characteristics of investment arbitrations. Nevertheless, despite the noble goals of ISDS, and perhaps because of the prevalence of investment arbitration, concerns ISDS and investment arbitration have continued to increase in prominence.

Distinguishing international commercial arbitration from investment arbitration

19 While debates about the legitimacy of investment arbitration have been occurring, and to a certain extent arising out of them, there has been a broader critique of international arbitration as a dispute resolution system.

³⁴ United Nations Conference on Trade and Development, *Special Update on Investor-State Dispute Settlement: Facts and Figures* (November 2017) <http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf>.

³⁵ UNCTAD, *op cit* 34.

- 20 The difficulty with this broader criticism is that far too often the two different types of international arbitration – commercial arbitration and investment arbitration – have been elided in the discussion of problems with international arbitration generally. Some of the concerns do overlap, but commercial arbitration and investment arbitration are fundamentally different, as are the reasons for the most prominent criticisms of each.
- 21 Although they share procedures, especially since a number of investment arbitrations occur under UNCITRAL rules and employ much of the same infrastructure, they address different matters. Investment arbitration involves a dispute between an investor and a sovereign State. It generally arises under the terms of an investment treaty and often may involve a challenge or assessment of the consequences of government policy. The dispute is one fundamentally involving a State in its sovereign capacity. In contrast, commercial arbitration involves a dispute between parties acting in their private capacity and arises out of a commercial transaction.³⁶ This is so even if one of the parties is governmental in character.
- 22 Though ISDS awards may, at the enforcement stage, make use of the structures of international commercial arbitrations,³⁷ the award arises through a process initiated under the relevant investment treaty that has been created in public international law to which the claimant is not a party. By contrast, in a commercial arbitration the arbitrator’s power to decide is a solely contractual one conferred by the decision of the parties to submit the relevant dispute to arbitration.³⁸
- 23 It is important, however, to remember, in the context of ISDS, that such disputes do not solely involve matters of public international law and treaty interpretation, or the effect of government policy on private business operations, but also require an understanding of the proper behaviour of government decision-making processes and the attendant principles of public law. ISDS is not solely a dispute about the interpretation of the bare text of an international treaty without regard to considerations of proper governance and the proper realm and extent of legitimate public policy. Thus an understanding of or familiarity with

³⁶ A distinction that is also adopted by commentators: see, eg. Carmody, *op cit* 21 at 100. Sarkonovic, *op cit* 20 at 250 has identified that that the nature of investment disputes “as between a private party ... and a sovereign State raise a number of issues not present in traditional commercial arbitration”

³⁷ See, eg. *International Arbitration Act 1974* (Cth) Pt IV, for enforcement of awards made under ICSID, and Pt II for enforcement of awards made under UNCITRAL rules.

³⁸ See generally *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 at [397]; *TCL Airconditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533. See also James Allsop and Clyde Croft, ‘The Role of the Courts in Australia’s Arbitration Regime’ (Paper delivered at the Commercial CPD Seminar Series, Melbourne, 11 November 2015).

principles that attend the validity and invalidity of government decisions is essential for the proper conduct of ISDS dispute resolution.

24 While there may be debates to be had about the legitimacy of ISDS – and I express no view other than identifying some aspects of them – we should not transmogrify concerns about ISDS into concerns about international commercial arbitration. The sovereignty and rule of law issues associated with ISDS, due to its inherent “public” nature, make it distinct from international commercial arbitration.³⁹ These considerations do not impinge upon commercial arbitration, and so criticisms concerning international commercial arbitration need to be considered from its own perspective, and with an appreciation of the proper nature of commercial arbitration as opposed to investment arbitration.

25 Lord Neuberger has identified nine reasons for why commercial parties have a preference for arbitration over litigation: the greater number of disputes demanding international arbitration; the high professional standards of arbitrators; the fact that arbitrators can be selected for their particular expertise; distrust of national courts in the context of international disputes; the enforceability of arbitral awards; greater speed; less expense; confidentiality; and finality.⁴⁰ The reality of some of those advantages can be debated. To them, however, can be added, a sense of control of the dispute, in particular with the absence of one or two levels of appeal.

Challenges for international commercial arbitration

26 The questioning of international commercial arbitration can be seen in four broad categories that overlap and relate to each other: first, confidentiality as a feature asserted to undermine legitimacy; secondly, the asserted negative influence on the development of the law by the lack of precedent; thirdly, concern over the characteristics and practice of arbitrators; and fourthly, unacceptable cost and delay.

27 One immediately sees a superficial similarity with legitimacy concerns of ISDS: the need for transparency and precedent, hence, the Mauritius Convention; and the complaint as to private

³⁹ Though it has been suggested that, despite its “public” nature, the “still dominant conceptualisation of investor-state dispute settlement [is] as a form of commercial arbitration and private justice”: Stephan W Schill, ‘Editorial: The Mauritius Convention on Transparency’ (2015) 16 *Journal of World Investment & Trade* 201 at 203.

⁴⁰ Neuberger, *op cit* 7 at 429. Cf recent data that indicates cost and delay as some of the “worst characteristics of international arbitration”: Queen Mary University of London, ‘White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf> at 7.

commercial arbitrators dealing with public policy issues. But the problems and solutions for commercial arbitration reveal the very different nature of the subject and the very different nature of the problem.

- 28 The public nature of ISDS has been put forward as a justification for the movement toward transparency and disclosure in investment arbitration. There are also public policy concerns attending confidentiality in commercial arbitration. The Australian High Court's decision in *Plowman* suggests that information pertaining to a commercial arbitration that was in the "public interest" ought to be disclosed.⁴¹ Lord Neuberger has spoken of the role international commercial arbitration plays in support of the rule of law internationally and that, having regard to this, there is an argument that arbitration should not always be confidential.⁴² Some commentators have even gone so far as to suggest that the UNCITRAL Rules on Transparency should be applied to international commercial arbitration on an 'opt out basis', as this would "increase the legitimacy of the system".⁴³ One cannot avoid, however, the reality that confidentiality in many cases is a critical demand of the parties and a feature of commercial arbitration that is a significant attraction. Insistence upon "transparency" (whatever that may mean in any given circumstance) in commercial arbitration in furtherance of some (not fully articulated) public policy may only drive parties to settle their differences outside arbitration and reduce the contribution of arbitration to the rule of law.
- 29 The assertion that the prevalence of international commercial arbitration has had a negative impact upon the law has been espoused most prominently by Lord Thomas.⁴⁴ He described arbitration as a "serious impediment to the development of the common law".⁴⁵ This view can perhaps be seen to be premised on the view that only courts make law and that arbitrators do not make any contribution to its development.
- 30 Lord Thomas was instrumental in establishing the Standing International Forum of Commercial Courts which met for the first time in London in May 2017. It is a gathering of heads of jurisdiction and experienced commercial judges from commercial courts all over the world. It aims to revitalise and strengthen the effective resolution of commercial disputes in

⁴¹ *Esso Australia Resources Ltd Plowman* [1995] HCA 19; 183 CLR 10 at 31, 35, 48.

⁴² Neuberger, *op cit* 7 at [26].

⁴³ Carmody, *op cit* 21 at 168-178. See also Rogers, *op cit* 20.

⁴⁴ Lord Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts arbitration" (Paper presented as the Bailii Lecture, 9 March 2016) at [6], [22]-[23].

⁴⁵ Lord Thomas, *op cit* 44 at [6].

commercial courts. I should add that the Federal Court of Australia is one of the courts in the Forum and I am on the Steering Committee. It aims to draw together the experience of commercial courts all around the world to enhance on a global level the skill of commercial courts. From its meetings there will develop an exchange of ideas about techniques and procedures to improve curial resolutions of commercial disputes.

31 I will say a little more on the question of arbitrators making law in a moment. It suffices to say at this point that the publication of redacted reasons of arbitral awards of importance on legal questions would go a long way to solving Lord Thomas' expressed concern without impinging necessarily upon the rights of privacy and confidentiality of the parties to their dispute. It may also burnish the reputation of the arbitral process, of the arbitrator and of the institution connected with the arbitration.

32 As has been pointed out by others, arbitrators can be seen to make law.⁴⁶ Publication of arbitral awards occurs, for instance, under the auspices of some arbitral institutions, such as the ICC and the LCIA.⁴⁷ Also, in the field of maritime arbitration, there would be little doubt that arbitrators make a contribution to the development of maritime law. Reports of arbitrations conducted under LMAA rules are reported in the *Lloyd's Maritime Law Newsletter* and used as precedents in arbitrations and in court. Similarly, the Society of Maritime Arbitrators in New York publishes the full text of its arbitral awards on LexisNexis.⁴⁸ The issue, thus, is one of practice and expectation. ICCA's own publication of case law and its educational work are further examples of public dissemination of arbitral law.⁴⁹

33 This question, however, raises the topic of the nature of the law in arbitration. This is a topic in itself: What is the place of law in arbitration? It is not a silly question. With the removal of any review on a question of law in the Model Law, the freedom of arbitrators to adjudicate even upon nominated systems of law is real. The legitimacy of the parties choosing non-national law, such as principles of international commercial law⁵⁰ makes the nature of law in commercial arbitration a subject that is not self-evident. The ability of arbitrators of skill and

⁴⁶ Doug Jones AO, 'Arbitrators as Law-Makers' (2018) 6 *Indian Journal of Arbitration Law* 19.

⁴⁷ Jones, *op cit* 46 at 24-27.

⁴⁸ See information at Society of Maritime Arbitrators, 'Find the SMA on Lexis-Nexis' (10 April 2018) <<http://www.smany.org/lexis-nexis-find.html>>.

⁴⁹ See International Council for Commercial Arbitration, 'Publications' (2018) <<http://www.arbitration-icca.org/publications.html>>.

⁵⁰ See, eg. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 1 QB 656 and [1993] AC 334.

experience to recognise and apply primary rules of law, fundamental international principles as well as secondary specific rules laid down by national statute and precedent means that if their decisions are public arbitrators can contribute to the rule of law just as judges do and the academy does.

34 Law is not merely the declared rules of a sovereign state. Law involves primary rules, principles and values that are timeless and not constrained by political or geographic boundaries. Commercial law is founded upon honesty, good faith and fair dealing, the requisite degree of relevant trust, a rejection of abuse of power and unconscionability, and faithfulness to the bargain freely and properly entered. That law can be non-national and non-binding was most eloquently expressed by Justice Jackson in *Lauritzen v Larsen*, reflecting upon the real existence of international maritime law, where he said:⁵¹

... courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

35 Turning to the arbitrators themselves, there have been a suite of concerns raised about arbitrators. These include concerns about the repeated appointments by the same parties of the same arbitrators, the prospect of so-called “issue conflict” presented by arbitrators acting in subsequent arbitrations where the same issues arise and issues about the lack of recourse to courts available after the rendering of an award. The concerns also include the inability of popular arbitrators to be available on a timely basis to hear arbitrations with sufficient promptness desired by commercial parties. This extends the timeline of disposition, and, axiomatically therefore, the costs.

36 The same issues appear to arise in respect of investment arbitration, where they are arguably more significant. In the Queen Mary University of London White & Case 2015 International Arbitration Survey respondents were asked whether, in the context of both international commercial arbitration and investment arbitration, there should be greater regulation of the appointment of arbitrators where an arbitrator had previously taken a view on an issue in the arbitration, had been repeatedly nominated as an arbitrator in multiple arbitrations by the parties, or had been repeatedly nominated in multiple arbitrations by counsel. The percentage

⁵¹ *Lauritzen v Larsen* 345 US 571 (1953) at 581-582.

of respondents answering “yes” was higher for investment arbitrations, though not substantially so in respect of the latter two issues.⁵²

37 It is worth making at least three points about these concerns. First, they would be diminished if there were regular publication of redacted reasons. Secondly, so-called issue conflict may be a concern to parties, but it is not necessarily apprehended basis. A judge and an arbitrator are not prevented from hearing a case because they have decided some legal aspect on a prior occasion. The relevant apprehension is not that one might lose, but that one will not have the dispute heard with an open mind. That said, if one does not know that one has a mind to change one may not appreciate the task before that particular arbitrator. Once again, publication of redacted reasons might alleviate this difficulty. Thirdly, the arbitration community has taken steps to address issues such as this, through measures including the International Bar Association’s *Guidelines on Conflicts of Interest in International Arbitration*⁵³ adopted in 2014. (I pause momentarily to make a plea about the misuse of the phrase “conflicts of interest”. There is no such thing. One’s interests never conflict. Interest can conflict with duty. Duty can conflict with duty. Questions of apprehended bias may arise. Documents such as the IBA’s *Guidelines on Conflicts* reflect, I think, the development of common principles attending apprehended bias rather than the questions of duty and interest or duty and duty conflicting. There is a danger in muddled language.)

38 There are significant challenges for international commercial arbitration in relation to dealing with cost, expense and delay. I have referred to this on previous occasions as the increasing “industrialisation” of arbitral procedure and practice.⁵⁴ I adopted this term in preference to that of what I saw as the somewhat offensive term of “judicialisation” used by some commentators.⁵⁵ The reason I did so, and why I took some offence, is because there is nothing inherently more costly or inefficient about litigation in a commercial court compared to arbitration. Good commercial courts can be swift and highly efficient. The real problem is a cultural one that leads to the generation of unnecessary process-driven costs.⁵⁶ The nature of the complaint is that arbitration has developed the same process-driven costs that

⁵² Queen Mary University of London, *op cit* 40 at 39-40.

⁵³ International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014).

⁵⁴ See James Allsop, ‘National courts and arbitration: collaboration or competition?’ (2015) 81 *Arbitration* 434 at 437; James Allsop, ‘International Arbitration and Conformity with International Standards of Due Process and the Rule of Law (Paper delivered at the ICCA Congress, Mauritius, 2016) at [58].

⁵⁵ See, eg. TJ Stipanovich, ‘Arbitration: The “New Litigation” [2010] *University of Illinois Law Review* 1.

⁵⁶ See Allsop, 2015, *op cit* 54 at 437; Allsop, 2016, *op cit* 54 at [58].

accompany poorly managed litigation.⁵⁷ This complaint is borne out by the results of the 2015 International Arbitration survey which identified cost, “lack of insight into arbitrators’ efficiency” and lack of speed as three of the most significant criticisms of international arbitration.⁵⁸

39 The problem of industrialisation needs to be resolved in both arbitration and litigation. It is a cancer in the body of both. It may be an exaggeration to describe industrialisation as an existential threat to arbitration, but the fact is that if arbitration cannot exist as an efficient and cost effective means of dispute resolution then it will simply not find favour with commercial parties.

40 The essential problem (in both litigation and arbitration) is that parties and their advisors have often ceased to view litigation and arbitration as a species of problem solving. I will return to this momentarily.

41 The issues facing international commercial arbitration are shared with investment arbitration. To a large extent, what the debate about the legitimacy of ISDS has done is reveal a shortcoming with the process of arbitration itself – investment and commercial – that members of the arbitration community should address.

42 Public interest is a common feature of ISDS and international commercial arbitration. But the public interest in international commercial arbitration is not sovereignty and public policy. Rather, it is the deep importance of international commercial arbitration in assisting to provide a global, cross-border dispute resolution system that operates in conjunction with, supported and supervised by, the dispute resolution mechanisms provided by commercial courts.⁵⁹ This public role for international commercial arbitration is what Lord Neuberger was referring to when he spoke of the function of arbitration in maintaining the rule of law over international commerce and, therefore, of the need for skilled arbitrators and sophisticated arbitral processes.⁶⁰ The public interest in maintaining skill and confidence in that system is what should drive any reassessment in relation to international commercial arbitration, not the public interest and sovereignty considerations that attend ISDS.

⁵⁷ James Allsop, 2016, *op cit* 54 at [58], citing Stipanovich, *op cit* 55.

⁵⁸ Queen Mary University of London, *op cit* 40 at 2. See also the discussion of this issue in Ramsey, *op cit* 1 at 1-2.

⁵⁹ Allsop, 2016, *op cit* 54 at [4]-[5]. A similar point is made by Susan L Karamaniam, ‘Courts and Arbitration: Reconciling the Public with the Private’ (2017) 9 *Arbitration Law Review* 1 at 8.

⁶⁰ Lord Neuberger, *op cit* 7 at [14]-[15].

Some potential solutions to the criticisms of international commercial arbitration

43 An appreciation of the differences between commercial arbitration and investment arbitration to which I have referred can contribute to a discussion of solutions to criticisms of commercial arbitration.

44 Confidentiality is, undoubtedly an important reason why commercial parties opt for arbitration in relation to many of their commercial disputes. Given that international commercial arbitration does not attract the same sovereignty and public legitimacy issues as investment arbitrations, I would suggest that there is no principled basis to require the implementation of transparency standards such as are contained in the Mauritius Convention into international commercial arbitration.⁶¹ That instrument provides for the public disclosure of documents pertaining to the arbitration, the openness of hearings to the public and the ability of third parties to intervene. The public aspect of commercial arbitration should be focused upon supporting its efficiency and the public's, including the commercial community's, confidence in its fair and just operation. That fundamentally important public policy consideration does not it seems to me to demand transparency of the kind reflected in the Mauritius Convention.

45 However, to the extent that the absence of reasons for award can be seen to potentially undermine the confidence in individual arbitrators and prevent the development of publicly available jurisprudence that degree of confidentiality may be seen to undermine the legitimacy of the worldwide arbitral process. This is not to be met by measures akin to the Mauritius Convention. Rather it should be met by a widespread acceptance of the publishing of redacted reasons for award. The reality is that, given the qualifications and experience of a number of international commercial arbitrators, the awards they would publish would provide a significant contribution to international commercial law. They will also provide enhanced confidence in those arbitrators and in the institutions that publish the awards.

46 As Professor Jones has argued, the publication of redacted arbitral awards would provide access to the "rich source of law to be found in the decisions of international commercial arbitrators".⁶² Such is obvious from some of the great minds that regularly act as arbitrators. The more widespread publication of awards, in some form, would better enable the

⁶¹ Cf Carmody, *op cit* 21.

⁶² Jones, *op cit* 46 at 24.

development of substantive commercial law for the benefit of international commercial law. In addition, it may go some way to resolve issues about inconsistency between different arbitral awards and the reasoning employed by some arbitrators, if awards are available for analysis, debate and use. Such a practice is being adopted by a number of arbitral institutions. These include the ICC's time delayed issuing of redacted awards and the LCIA's publishing of summaries of challenges to arbitrators.⁶³ I have already discussed the practice of the LMAA and Society of Maritime Arbitrators in publishing details of awards in respect of maritime arbitrations conducted in London and New York.

47 In the context of international commercial arbitration, I see all of these steps as means of enhancing arbitration as a sought-after dispute resolution mechanism and as part of a system of cross-border dispute resolution.

48 The question of whether commercial arbitration is stifling the development of commercial law contains an at least implicit allegation that international commercial arbitration is usurping the role of national courts. There are several observations I wish to make about this. First, the publication of redacted awards may also assist with resolving this concern as there would be a body of arbitral law that could be explored and, if necessary, critiqued by the courts in appropriate cases. Secondly, it is important to remember that international commercial arbitration remains subject to the supervision of the domestic court of the seat. A nuanced and principled body of law has been developed by commercial courts to supervise arbitrations, review arbitral awards and, ultimately, enforce arbitral awards. In many jurisdictions, the framework for this supervision is provided by the UNCITRAL Model Law on International Commercial Arbitration and its international adoption means there has been a development of a harmonised approach to the supervision of arbitrations.⁶⁴ This approach gives authority to the arbitrator, but does not prevent review of certain matters such as jurisdiction by a national court, with that court also able to supervise and provide support to the arbitral process.⁶⁵ The continued involvement of the courts in supervising arbitrators reflects the public role of international commercial arbitration as part of the cross-border civil

⁶³ Jones, *op cit* 46 at 26; Rogers, *op cit* 20 at 1315.

⁶⁴ For a discussion of Australia's approach to the supervision of international commercial arbitration by the Courts see, eg. Allsop and Croft, *op cit* 38; Patrick Keane AC, 'Courts and international arbitration: a reappraisal of roles' in John McKenna, *Queensland Legal Yearbook 2016* (Supreme Court of Queensland Library, 2018 at 360).

⁶⁵ For an example of this approach based on the UNCITRAL Model Law, albeit in a domestic arbitration context, see *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170.

justice system. Thirdly, the relationship between national commercial courts and arbitration is not a static one. It is dynamic. The attraction of either method of dispute resolution depends upon many factors but chief among them are skill and capacity of commercial judges and arbitrators; the speed with which a reliable decision can be reached by them; the vulnerability to challenge whether by appellate review or by judicial supervision; and, most importantly, enforcement. The astonishing success of the New York Convention is too well-known to require any discussion here. Over the coming years, as the adherence to the Hague Convention on Choice of Courts increases, national commercial courts will begin to have the same regime of enforcement as does arbitration for its awards. Fourthly, in recent years a number of jurisdictions have sought to develop bespoke international commercial courts characterised by excellence and dispatch. These include the Singapore International Commercial Court, the Dubai International Financial Centre Courts, Abu Dhabi Global Market Courts and the Qatar International Court.⁶⁶ These seek to rival the dominance in the English speaking world of the London Commercial Court. These exist together with the numerous international arbitration centres in London, Singapore, Hong Kong, New York, Paris, Geneva, here in Sydney and also in Melbourne. These courts are not replacements for international commercial arbitration. Rather, they represent the development of a mature transnational commercial dispute resolution system. Commercial courts and commercial arbitration complement each other,⁶⁷ though they are competitive with each other. I have previously described the relationship as one of “competitive collaboration”.⁶⁸ Competition between courts and arbitrators for disputes is healthy, particularly in parts of the world which are supportive both of skilled arbitrators and focused and innovative commercial courts. Such competition promotes efficiency and, for arbitrators, it may present an impetus for resolving some of the matters discussed today.⁶⁹

⁶⁶ See the discussion, particular of the Singapore International Commercial Court, by Marilyn Warren AC and Clyde Croft, ‘An International Commercial Court for Australia – Looking beyond the New York Convention’ (Paper presented at the Commercial CPD Seminar Series, 13 April 2016). I have expressed the view on an earlier occasion that, but for the decision in *Re Wakim* [1999] HCA 27; 198 CLR 511, Australia would have an International Commercial Court in operation today: James Allsop, ‘The Role and Future of the Federal Court within the Australian Judicial System’ (Paper presented at the ANU 40th Anniversary of the Federal Court of Australia Conference, 9 September 2017) at 9.

⁶⁷ Ramsey, *op cit* 1 at 2-3; Allsop, 2015, *op cit* 54 at 434.

⁶⁸ Allsop, 2015, *op cit* 54 at 434.

⁶⁹ Chief Justice Menon of Singapore has suggested that some of these issues may, indeed, be a reason for parties to take their disputes to an international commercial court: Sundaresh Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’ (Paper presented as the Opening Lecture for the Dubai International Financial Centre Courts Lecture Series 2015, Dubai, 2015) at [14]-[15].

49 In the context of investment arbitration, there is presently a push toward the establishment of a multilateral investment court to replace ISDS based arbitration. The European Union has emerged as an advocate for this proposal and has made submissions to UNCITRAL. This is based upon what it describes as “systemic” issues with ISDS, coupled with a recognition of the “public” nature of investment arbitration and its impact upon “the sovereign capacity of states to regulate”.⁷⁰ The EU proposal for a multilateral investment court is predicated on a recognition of the fundamental public issues implicated in investment arbitration and which I have indicated above. Its concerns about ISDS arise in that context, as does its proposal for a multilateral investment court. Those arguments, thus, have a different motivation than those complaints about international commercial arbitration that are in favour of the development of international commercial courts.

50 The 2015 International Arbitration Survey asked respondents how a potential appeal mechanism in both international commercial arbitration and investment arbitration should be structured. 51% of respondents responded in favour of an international court in respect of investment arbitration. Only 20% did so in respect of international commercial arbitration, just in front of a domestic court at 19%. The most favoured option for international commercial arbitration was an appeal to another arbitral tribunal or the arbitral institution (26% each).⁷¹ Commercial parties often will provide in an arbitration agreement for a right of appeal, if it is desired by the parties.

51 These responses do reveal an appreciation of the differences between investment and commercial arbitration. For international commercial arbitration, there is no equivalent market demand nor is there any compelling policy reason to add some appellate structure. The parties after all have it within their power, the power of contract, to create such an appeal structure. Given the nature of international commercial dispute resolution and the present unstructured system that promotes competition between so-called international commercial courts and domestic commercial courts there are not attendant sovereignty and legitimate issues that might be said to require a supranational body.

52 The most significant issue for international commercial arbitration is, in my view, its increasing cost. It can be described as the cancer of industrialisation which also invades the

⁷⁰ See UNCITRAL, *op cit* 1.

⁷¹ Queen Mary University of London, *op cit* 40 at 9.

body of court litigation. This is not per se an issue of competence (although it may reflect a lack thereof) or legitimacy but it is a topic of concern amongst commercial parties and members of the arbitration community.⁷² The problem is contributed to by parties, counsel and arbitrators. Respondents to the 2015 International Arbitration Survey indicated that counsel could do better to narrow issues, limit document production, encourage settlement, not over-lawyer, consider joint expert reports and generally act more efficiently.⁷³ The problem of “industrialisation”, and the consequent incurring of large, process-driven costs, is one shared with court litigation. Commercial arbitration, along with commercial litigation, needs to be recognised as a process for efficient resolution of a mutual problem; it should not be seen as a means of fee generation. To adapt what was said by Harvey CJ in Eq of the Supreme Court of New South Wales in *Read v Chown*⁷⁴ back in 1929 in a judgment dealing with costs of an originating summons in Equity:⁷⁵

The primary duty of solicitors is of course to their clients, and it is the duty of solicitors to give their clients such advice as will reduce the costs [of the litigation]. Human nature is human nature. Of course, solicitors have to live, and it is not unnatural they should look to the chance of appearing in a [matter] of this sort for the purpose of making legitimate fees from it, but I wish to point out to solicitors that it is their duty ... to attempt to reduce the costs.

53 The concerns raised about “industrialisation” are not so lacking in nuance as to be a mere criticism of the cost of arbitration or of the legitimate charging of professional fees by skilled lawyers, counsel and arbitrators for the work that needs to be done. Rather, it is a complaint about the creation of process-driven costs, incurred merely because such costs are seen to be usually required, or have become common practice. It is a complaint against unoriginality, and a lack of lateral thinking in how to run a proceeding. It is also a criticism of the habit of thought that proceedings exist to create such processes or costs for their own sake, rather than for resolving the dispute between the parties. There is no complaint against the legitimate earning of fees for work well done. These ideas are captured, if I may say so, by Chief Judge Harvey’s statement.

54 Thus, I would suggest that the greatest challenge for the continued popularity and indeed legitimacy of international commercial arbitration is developing greater efficiencies and adopting a more problem-solving focused approach to arbitral procedure. On a previous

⁷² Queen Mary University of London, *op cit* 40 at 2.

⁷³ Queen Mary University of London, *op cit* 40 at 30.

⁷⁴ (1929) 46 NSWWN 154

⁷⁵ 46 NSWWN at 155-156.

occasion I suggested that greater use of early and proactive case management within arbitration may be a means of resolving these problems around industrialisation.⁷⁶ Arbitration culture, indeed dispute resolution culture, needs to recognise that issues of cost and a lack of efficiency must be addressed.

55 Competition between courts and arbitration is an important way for both dispute resolution processes to improve their processes and reduce costs, as it provides an incentive for both judges and arbitrators to experiment and innovate.⁷⁷

56 Those involved in arbitration must examine for themselves how they are working. However, just as court litigation can learn from arbitration, so arbitration may be able to learn from court litigation. With increasing frequency, courts are rejecting standardised one size fits all cookie cutter approaches to litigation. Commercial judges in Australia will generally not tolerate the linear progression of interlocutory procedure like some critical path building programme for the construction of a skyscraper. Discovery has either been curtailed or replaced by more flexible solutions. Examples are the restriction of discovery in a limited way after, not before, the exchange of evidence; the use of referees to replace the need for competing expert evidence; the replacement of discovery in the traditional way by giving a party a right to place a prospective expert within the business of the other party and simply call for documents. This last example can be most effective in cases such as business interruption claims on ISR policies where the potential for discovery is overwhelmingly burdensome. The provision of an office, a computer and a photocopying machine to an investigating accountant who calls for documents which are provided in a recorded and indexed fashion does away with the need for armies of blindfolded automatons preparing and then examining meaningless lists of millions of documents. None of these solutions are a panacea to costs but each of them in its proper context can be a nuanced and intelligent substitute for mindless and often useless pre-trial procedure.

57 The problem is also related to arbitrators. They must be readily available to hear cases as soon as possible. The longer a proceeding lasts, the more it costs. They must also exert control over the expenditure of time and money on less than central issues.

⁷⁶ Allsop, 2016, *op cit* 54 at [59].

⁷⁷ Allsop, 2015, *op cit* 54 at 437.

58 What must be emphasised is the need to consider the individual characteristics of each matter. This is not detracting from predictability of outcome. It is the recognition that every piece of litigation is unique and the most effective and cost effective resolution of any particular problem will call upon the parties and their representatives for goodwill, a shared understanding of the need to solve a problem, skill and diligence, and a recognition of what Chief Judge Harvey said, that those who act for commercial parties have a duty to those parties to solve their problems at the least possible cost. I do not consider that these are dreamings of a simpler past. I have been involved in dispute resolution for nearly 40 years. I have seen dispute resolution ranging from the appalling to the excellent. It is not a matter of it having been done better in the past. It was often done far worse in the past. But the only dispute resolution that I have seen that exhibits the public good of an efficient justice system had at its heart a shared understanding that the process was attempting to resolve as quickly and as cost effectively as possible a mutual problem for the clients concerned. Sometimes this came from the representatives themselves. Sometimes it came from the uncompromising demands of the commercial court in question. It is not a question of speed alone. It is not a question of a magic formula. It is a question of culture and a recognition that for clients to be served honestly and effectively the practitioner had to do his or her best to extricate the client from the problem whether by settling or winning the dispute in the most efficient manner.

59 The development and widespread use of international commercial arbitration around the globe has been one of the most significant features of international commercial law that developed over the course of the twentieth century. It has produced a cross-border dispute resolution system that is supported by and interacts with, but is independent from, national courts and which operates in parallel with international commercial courts. This has been a major step in the application of the rule of law to global commercial transactions. It is important that, in this age of reactionary policy-making, we do not allow concern about certain aspects of investor-state dispute settlement – itself a remarkable triumph of law over war – to weaken the system of international commercial arbitration that has been established, for reasons that are not relevant to commercial arbitrations. Ensuring that international commercial arbitration remains efficient, effective and innovative will go a long way toward ensuring that this does not occur. The kind of thoughtful introspection reflected in the programme for this week that picks up many of the threads of what I have been discussing will no doubt advance that position. There is no perfect model of dispute resolution. As soon as you think you have found it and try to write it down you begin to ossify it and create a

framework for more procedural costs. Critical is the recognition that costs and delay are often, indeed usually, a product of bad litigation culture. There are countless tools and innovative approaches in the management of commercial dispute resolution. A cultural approach that focuses upon mutual problem solving, effectively, innovatively and cost effectively, will generally help to illuminate the best way to run and manage a piece of litigation. That best way will rarely, if ever, be manifested in the serried ranks of litigation troops ready to die of exhaustion at 3:00am reviewing documents on discovery. If one is awake, 3:00am is the time to contemplate the heart, not conduct litigation.

60 I hope that the discussions to follow as part of this Congress might go some way to developing proposals for the resolution of some of the matters I have identified, and that my remarks resonate to a degree with you in this room.

Sydney

16 April 2018